BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HERCULES NEWTON, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 265,221
GREDE FOUNDRIES, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the November 26, 2001, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes.

Respondent contends the Administrative Law Judge erred in finding claimant suffered accidental injury and/or occupational disease arising out of and in the course of his employment with respondent and in finding that claimant provided timely notice as required by K.S.A. 44-520. Respondent further objects to the Administrative Law Judge's Order for production of records, arguing that the Order is overly broad and unnecessarily burdensome to respondent.

ISSUES

(1) Did claimant suffer accidental injury and/or occupational disease on the dates alleged?

(2) Did claimant's accidental injury and/or occupational disease arise out of and in the course of his employment with respondent?

(3) Did claimant provide timely notice of accidental injury and/or occupational disease as required by either K.S.A. 44-520 or K.S.A. 44-5a17?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds that the Order of the Administrative Law Judge granting claimant benefits should be affirmed and the Order of the Administrative Law Judge requiring respondent to provide certain requested documentation should be modified, in part, and affirmed, in part.

Claimant alleges that he suffered injury while working for respondent as an iron pourer. Claimant first began working for respondent on March 7, 1977, and has worked in that same capacity since that time. The job of iron pourer requires that claimant hold a heavy ladle filled with liquid iron. The liquid iron is then poured into molds. Claimant testified that, at times, smoke and fumes would come off of the liquid iron and he would breathe the smoke and fumes. During the time claimant worked as an iron pourer, no protective breathing apparatus was provided.

Claimant also worked for respondent on weekends in a job called "reline." This required that claimant chip out old lining in the furnaces and then reline the furnaces with new material. Claimant had also been performing that job for approximately 24 years, nearly the entire time of his employment with respondent. Claimant would use a power chipper while performing those duties.

Sometime after 1994, apparently after an OSHA investigation, claimant was provided a protective air mask to be worn while performing the reline job. Approximately three or four years prior to the preliminary hearing, claimant was fitted with a breathing mask, which provided an air supply while claimant worked on the reline job.

Claimant testified that he has never smoked and had been in good health through most of his life.

As part of the ongoing employment relationship, respondent required physical examinations of its workers every one to two years. These physical examinations were performed with the aid of Dr. Raghaven, respondent's authorized physician. As part of the physical examination, claimant underwent a lung capacity evaluation. The reports of these lung capacity evaluations were provided to respondent and at least some of them were reviewed by respondent's human resources manager, Terry Duckworth. Mr. Duckworth testified that he read the reports from 1998 and 1999. Those reports, beginning in 1994, indicated that claimant was suffering from low lung function. The reports also indicated

claimant had a restrictive disorder. Mr. Duckworth acknowledged reading the pulmonary function studies which suggest the restrictive disorder, but did not understand their meaning and did nothing to investigate. Claimant was never advised that he suffered from any type of low lung function or restrictive breathing disorder.

Claimant's last day of work was November 6, 2000. Shortly after that, claimant was diagnosed with ongoing pneumonia and was hospitalized. Claimant has been under medical care since that time and was in the intensive care unit, hooked to a breathing machine for a period of time.

Claimant did not report a work-related injury to respondent until respondent received claimant's Claim For Workers Compensation on April 18, 2001, advising of his workers' compensation claim. However, Jay Gingraux, the melt general supervisor, was aware that claimant had suffered health problems for several years. Claimant had been diagnosed with pneumonia and had missed a period of work several years before. Mr. Gingraux also noticed that, on several occasions, claimant was short of breath and had difficulty performing his job duties. He also stated claimant appeared very tired, especially during the time period just before claimant left respondent's employment.

Claimant was initially treated by Antonio L. Osio, M.D., his personal physician. Dr. Osio was also responsible for admitting claimant to the hospital and supervising the ongoing treatment for claimant's lung conditions.

Dr. Osio, after referring claimant to several specialists, opined in his May 16, 2001, letter that claimant experienced breathing difficulties and the inability to resume normal activities due to his breathing difficulties and weakness. His report discussed a lung biopsy which was performed on claimant, showing chronic inflammation and fibrosis of the lungs, with iron traces visible in the lung and bronchial tissues. Dr. Osio went on to state that claimant had developed a chronic lung condition which, in the doctor's words, "is more than likely due to repeated exposure to iron and their particles at his work."

Dr. Osio opined claimant's condition was not likely to improve with either medical therapy or surgery, and the best he could hope for would be to receive supportive care, as his condition would likely deteriorate over time.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 44-508(g).

K.S.A. 44-501 also states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.

In order for a claimant to collect workers' compensation benefits, the injury that he suffers must arise both out of and in the course of his employment. K.S.A. 44-501.

> The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. . . . An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

K.S.A. 44-5a01(b) defines occupational disease as being:

> . . . a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular

> employment, and hazards of diseases and conditions attending employment in general, shall not be compensated as occupational diseases. . . .

The test results attached to the preliminary hearing transcript show that the air in the vicinity where claimant worked did contain iron and iron particles. Dr. Osio determined claimant's chronic inflammation and fibrosis of the lungs were connected to and probably caused by the iron traces which could be seen in claimant's lung and bronchial tissue. The pathology report identified the bodies as suggestive of possible asbestos, nonasbestos minerals or metal exposure. The particles were specifically identified by iron stain.

The Appeals Board finds that claimant has proven that he suffered accidental injury and/or occupational disease arising out of and in the course of his employment.

K.S.A. 44-5a17 requires that written notice of occupational disease be given to the employer within 90 days of disablement. In this instance, claimant's written notice was not in respondent's possession until April 18, 2001, which is more than 90 days beyond claimant's last date of employment of November 6, 2000.

K.S.A. 44-5a17 goes on to state, however, that:

> Actual knowledge of such disablement, by the employer in whose employment the employee or workman was last injuriously exposed, or by the responsible superintendent or foreman in charge of the work, shall be deemed notice within the meaning of this section.

Claimant was required by his employer to undergo yearly physical examinations which included testing claimant's lung capacity. The reports, which showed that claimant suffered from diminished lung capacity, were provided to respondent on a regular basis. Respondent's human resources manager, Mr. Duckworth, reviewed those reports and understood that claimant did have what was considered to be a restrictive disorder in his lungs. Mr. Duckworth testified he did not understand the ramifications of that report, but those medical examinations were obviously required by respondent for a reason. In addition, the medical information was provided by respondent's doctor to respondent, and both respondent's human resources manager and respondent's melt general supervisor, Mr. Gingraux, were aware that claimant was having physical problems, including a history of pneumonia, necessitating a brief stay in the hospital. Mr. Gingraux also noticed that claimant appeared very tired and, at times, was unable to perform his job duties because he was short of breath. Upon consideration of the entire record, the Appeals Board finds

that respondent had actual knowledge of claimant's disablement for the purposes of K.S.A. 44-5a17 and, therefore, notice within the meaning of that section was appropriately provided.

K.S.A. 44-520, which requires notice to the employer within ten days after the date of accident, also goes on to state "except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary."

The Appeals Board again focuses on the medical information provided to respondent and its representatives yearly during claimant's physical examination. The Appeals Board finds regardless of whether this is deemed accidental injury or occupational disease, the notice provisions of the statutes have been satisfied.

The Appeals Board must next consider respondent's request for a limitation of the discovery Order provided by the Administrative Law Judge at claimant's request.

Appeals of preliminary hearing orders are limited by K.S.A. 44-551 and K.S.A. 44-534a.

K.S.A. 44-551 grants the Board jurisdiction to review the following:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

The Board's jurisdiction to review preliminary hearing findings are generally limited under K.S.A. 44-551 and K.S.A. 44-534a. However, orders for production constitute final orders within the meaning of K.S.A. 44-551. Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. The Kansas Court of Appeals has recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. There are three criteria which the Court of Appeals has defined which make an order a final order. The order may be a final order even if it does not resolve all the issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable

on appeal from a final judgment. Skahan v. Powell, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

The Board has ruled in the past that orders for production satisfy the above three criteria. In Rhodeman, Sr., v. Moore Management, WCAB Docket No. 234,890 (Oct. 1999), the Board ruled that an order for production was separate from the merits of the action and effectively unreviewable after the documents had already been produced. The interest in Rhodeman was the interest in protecting the claimant's confidential information which did not relate to the workers' compensation proceedings. The claimant successfully argued, in Rhodeman, that once the documentation was produced, the damage was done and could not be undone. Here, as in Rhodeman, once the information is disclosed, there would be no effective remedy.

Therefore, the Appeals Board will consider respondent's arguments that the Order for production provided by the Administrative Law Judge should be quashed or, in the alternative, modified.

Chapter 44, the Kansas Workers Compensation Act, contains no specific discovery provisions. Therefore, we look to Chapter 60 for guidance.

K.S.A. 60-226(b) states as follows:

> *Scope of discovery*. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *In general*: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

K.S.A. 60-226(c)(4) allows a protective order stating:

> that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. . . .

Claimant, in his Motion For Production, filed six specific requests. At the preliminary hearing, the Administrative Law Judge correctly noted that respondent had no objection to request number 1. The Board, therefore, affirms the Administrative Law Judge's Order for production as it relates to request number 1 of claimant's Motion For Production.

With regard to request numbers 2 and 3, respondent does not object to producing the information requested but requests that it be limited to the areas of the plant where claimant worked. Respondent's attorney stated at the preliminary hearing that she had already provided over 1,200 pages of material. This already provided material only related to information available at the Wichita plant from 1993 forward. Claimant's request was backdated to 1977, when claimant first began working for respondent. The information before 1993 was archived at respondent's corporate headquarters in Milwaukee, Wisconsin, and the production of those documents would be extremely difficult, time consuming and expensive. Respondent's request that the matter be limited to areas of the plant wherein claimant regularly worked is appropriate under these circumstances. The Appeals Board, therefore, modifies the Order for production by the Administrative Law Judge to limit request numbers 2 and 3 to all documents relating to any and all areas of the plant wherein claimant worked during his 24 years of employment with respondent.

With regard to request numbers 4 and 5, respondent's attorney at the preliminary hearing advised the court that she had already produced those documents, thereby, rendering those issues moot.

With regard to request number 6, which deals with copies of the Liberty Mutual short-term disability, long-term disability and life insurance policies or master policies available to claimant and his spouse, the Appeals Board finds this request to be inappropriate. Policies covering claimant and claimant's wife and dealing with disability, life and master policies do not apply to workers' compensation litigation. The Workers Compensation Board has no jurisdiction over those documents. The Board finds the Order of the Administrative Law Judge requiring respondent to produce the documents listed in request number 6 of claimant's Motion For Production should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated November 26, 2001, granting claimant benefits should be, and is hereby, affirmed, and the Order of Administrative Law Judge Barnes also dated November 26, 2001, granting claimant's request for production of documents should be, and is hereby, affirmed, in part, and modified, in part, consistent with the above findings.

IT IS SO ORDERED.

Dated this ____ day of February 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Kathleen N. Wohlgemuth, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director